# Abdul Malek bin Idrus & Ors v Tan Jee Han

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO MT 12B-161–09 OF 2012
ABDUL RAHMAN SEBLI J
28 MARCH 2013

*Police — Tortious liabilities — Negligence — Whether police liable for loss and damage caused to plaintiff by suspect they were pursuing — Whether necessary to show plaintiff and police had special relationship giving rise to exceptional duty of care to prevent plaintiff from being harmed by third party — Whether plaintiff must establish police had control over third party's actions and had duty to ensure third party did not act in way that endangered plaintiff's safety — Whether foreseeability alone not test to determine if police owed such duty of care*

The first appellant was driving a police patrol car whilst on duty with a colleague when their suspicions were aroused by the movements of a Proton Waja car ('the Waja'). As they neared the Waja to stop the car and carry out checks, it sped off. The patrol car gave chase, its siren and emergency flashing lights activated. The Waja got onto a highway and began going against the flow of traffic, the patrol car still in pursuit. The Waja hit a car and finally stalled after colliding head-on with a car driven by the respondent. The driver of the Waja was arrested and in the car the police found a stolen revolver and seven live bullets. The respondent was seriously injured in the crash but instead of suing the driver of the Waja for colliding into him, he sued the appellants instead for damages alleging that his injuries were caused by the first appellant's negligence. The second and third appellants were sued for being vicariously liable for the actions of the first appellant. The sessions court held the appellants to be 100% liable and awarded the respondent a substantial sum in damages. The whole basis of the trial judge's finding on liability was that it was reasonably foreseeable that the first appellant's act of chasing after the Waja would inevitably have led to an accident. In the appellants' instant appeal against that decision, the respondent contended that the first appellant breached his duty of care to the respondent when he continued to chase after the Waja after it became apparent its driver was determined to escape by whatever means possible without regard for the safety of other road users. He argued that the first appellant should have abandoned his pursuit when the Waja went against the flow of traffic as the safety risks to other road users at that stage of the chase was particularly high.

**Held,** allowing the appeal with costs:

(1) Before the police could be held liable for any loss or damage caused to a

plaintiff by a third party, it had to be shown that the police had a special relationship to the plaintiff giving rise to an exceptional duty of care to prevent harm from being inflicted on him by the third party. The onus was on the plaintiff to establish that: (a) the police had power of control over the third party's actions; and (b) they had a duty to ensure the third party did not act in such a way as to endanger the plaintiff's safety (see para 20).

(2) In the present case, it had not been shown that the police had power of control over the actions of the Proton Waja driver. Neither was it shown that they had a duty to prevent the Waja's driver from driving recklessly in his bid to escape. In the circumstances, there was no special relationship between the police and the respondent giving rise to an exceptional duty of care on the part of the police to prevent the Waja's driver from causing harm to the respondent. The sessions court was wrong in finding the appellants liable for the loss suffered by the respondent (see para 20).

(3) Foreseeability was the only factor the trial judge took into account in determining whether a duty of care was owed by the police to the respondent, ie that it was reasonably foreseeable the first appellant's act of chasing after the Waja would inevitably have caused an accident. However, the mere fact the accident was foreseeable did not of itself give rise to a duty of care towards the respondent. The police were under no duty of care to protect road users from, and to warn them of, the dangers created by the reckless driving of the Waja's driver. To impose on the police the duty to protect a third party from danger created by a suspect fleeing from them was to impose an unwarranted burden on the police in their primary duty of suppressing crime (see paras 7, 8 & 15).

(4) Even on the 'neighbour' principle propounded in *Donoghue v Stevenson* [1932] AC 562, the respondent did not fall under the category of persons 'who are so closely and directly affected' by the act of the police in chasing after the Waja. The act that so closely and directly affected the respondent was the act of the Waja's driver in deliberately encroaching into his path. The loss suffered by the respondent was caused directly by the act of the Waja's driver and not directly by the first appellant's act or omission. The respondent should have sued the driver of the Waja and it was for him to have added as third parties those whom he felt should indemnify him (see paras 3–4).

(5) The argument that the first appellant ought to have abandoned the pursuit when the Waja went against the flow of traffic was incredulous. Not only would the police be in dereliction of duty if they did that; they would be giving the criminal they were chasing a free passage to freedom. That was not what the police were for. In the instant case, the suspect turned out to be armed and dangerous. There was a revolver and live bullets inside the Waja and it was possible the suspect was on his way to

commit a crime. The manner he made his getaway, with no regard whatsoever for the safety of other road users, gave some indication as to his criminal propensity (see para 14).

(6) Claims of the nature in the instant case should be disallowed on grounds of public policy (see para 14).

**[Bahasa Malaysia summary**

Perayu pertama sedang memandu kereta peronda polis semasa menjalankan tugas bersama rakan sekerja apabila mereka mensyaki pergerakan kereta Proton Waja ('Waja tersebut'). Apabila mereka menghampiri Waja tersebut untuk memberhentikan kereta itu dan melakukan pemeriksaan, kereta tersebut telah memecut pergi. Kereta peronda itu telah mengejarnya, dengan siren dan lampu kecemasan yang dipasang. Waja tersebut telah masuk ke lebuh raya dan dipandu arah bertentangan arus trafik dengan kereta peronda itu masih mengejarnya. Waja tersebut telah melanggar sebuah kereta dan akhirnya terhenti selepas berlanggar secara bertentangan pada bahagian depan dengan kereta yang dipandu oleh responden. Pemandu Waja tersebut telah ditangkap dan dalam kereta itu pihak polis menemui pistol yang dicuri dan tujuh butir peluru hidup. Responden telah mengalami kecederaan teruk dalam kemalangan itu, responden menyaman pemandu Waja tersebut kerana berlanggar dengannya, seharusnya dia telah menyaman perayu-perayu tetapi untuk ganti rugi dengan mendakwa bahawa kecederaannya telah disebabkan oleh tindakan perayu pertama. Perayu-perayu kedua dan ketiga telah disaman kerana bertanggungjawab secara vikarius kerana tindakan-tindakan perayu pertama. Mahkamah sesyen memutuskan perayu bertanggungjawab 100% dan mengawardkan sejumlah besar ganti rugi kepada responden. Asas keseluruhan penemuan hakim perbicaraan berhubung liabiliti adalah bahawa ia boleh dijangka secara munasabah bahawa perbuatan perayu pertama mengejar Waja tersebut akan membawa kepada kemalangan yang tidak dapat dielakkan. Dalam rayuan perayu-perayu ini terhadap keputusan tersebut, responden berhujah bahawa perayu pertama telah melanggar kewajipan berjaga-jaganya kepada responden apabila dia terus mengejar Waja tersebut selepas ia jelas yang pemandunya nekad untuk melepaskan diri dengan apa cara yang mungkin tanpa mengira keselamatan pengguna jalan raya lain. Dia berhujah bahawa perayu pertama patut menghentikan pengejarannya apabila Waja tersebut dipandu bertentang arus trafik kerana risiko keselamatan pengguna-penguna jalan raya pada masa kejadian kejar-mengejar itu amat tinggi.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Sebelum polis boleh dikatakan bertanggungjawab untuk apa-apa kerugian atau kerosakan disebabkan kepada plaintif oleh pihak ketiga, perlu dibuktikan bahawa polis mempunyai hubungan istimewa terhadap plaintif sehingga menimbulkan kewajipan berjaga-jaga yang luar biasa

untuk menghalang apa-apa keburukan berlaku ke atasnya oleh pihak ketiga. Beban terletak atas plaintif untuk membuktikan bahawa: (a) polis mempunyai kuasa untuk mengawal tindakan pihak ketiga; dan (b) mereka mempunyai kewajipan untuk memastikan pihak ketiga tidak bertindak dalam cara yang membahayakan keselamatan plaintif (lihat perenggan 20).

(2) Dalam kes ini, ia tidak ditunjukkan bahawa polis mempunyai kuasa untuk mengawal tindakan pemandu Proton Waja itu. Ia juga tidak ditunjukkan bahawa mereka mempunyai kewajipan untuk menghalang pemandu Waja itu daripada memandu secara melulu dalam cubaannya untuk melarikan diri. Dalam keadaan itu, tiada hubungan istimewa antara polis dan responden sehingga menimbulkan kewajipan berjaga-jaga yang luar biasa di pihak polis untuk menghalang pemandu Waja tersebut daripada berlaku apa-apa yang buruk ke atas responden. Mahkamah sesyen adalah salah apabila mendapati perayu-perayu bertanggungjawab atas kerugian yang dialami oleh responden (lihat perenggan 20).

(3) Kebolehramalan adalah satu-satunya faktor yang telah diambil kira oleh hakim perbicaraan dalam menentukan sama ada terdapat kewajipan berjaga-jaga oleh polis terhadap responden, iaitu ia adalah munasabah untuk meramal tindakan perayu pertama yang mengejar Waja tersebut yang akhirnya menyebabkan kemalangan. Walau bagaimanapun, fakta semata-mata yang kemalangan itu boleh diramal dengan sendirinya tidak menimbulkan kewajipan berjaga-jaga terhadap responden. Polis tidak mempunyai kewajipan berjaga-jaga untuk melindungi pengguna-pengguna jalan raya daripada, dan untuk memberi amaran kepada mereka tentang, bahaya-bahaya yang timbul akibat pemanduan secara melulu pemandu Waja tersebut. Untuk meletakkan kewajipan ke atas polis untuk melindungi pihak ketiga daripada bahaya yang timbul daripada orang yang disyaki yang melarikan diri daripada mereka adalah untuk meletakkan beban yang tidak wajar ke atas pihak polis dalam tugas utama mereka untuk menumpaskan jenayah (lihat perenggan 7, 8 & 15).

(4) Walaupun atas prinsip 'kejiranan' yang diputuskan dalam kes *Donoghue v Stevenson* [1932] AC 562, responden tidak terangkum di bawah kategori orang 'who are so closely and directly affected' oleh perbuatan polis mengejar Waja tersebut. Perbuatan yang amat menjejaskan secara dekat dan terus kepada responden adalah perbuatan pemandu Waja tersebut yang sengaja memasuki jalannya. Kerugian yang dialami oleh responden disebabkan secara langsung oleh perbuatan pemandu Waja tersebut dan bukan secara langsung oleh perbuatan atau peninggalan perayu pertama. Responden patut menyaman pemandu Waja tersebut dan dia patut ditambah sebagai pihak ketiga yang mana dirasakannya patut menanggung ganti ruginya (lihat perenggan 3–4).

(5) Hujah bahawa perayu pertama patut tidak meneruskan pengejaran apabila Waja tersebut masuk ke laluan trafik tidak boleh dipercayai. Bukan sahaja polis dikatakan cuai dalam tugasnya jika berbuat demikian; mereka akan memberi penjenayah yang dikejar mereka itu jalan percuma untuk bebas. Itu bukan yang diingini oleh polis. Dalam kes ini, orang yang disyaki ternyata bersenjata dan berbahaya. Terdapat sepucuk pistol dan peluru hidup dalam Waja tersebut dan berkemungkinan orang disyaki itu dalam perjalanan untuk melakukan jenayah. Cara dia cuba melarikan diri, tanpa mengira apapun tentang keselamatan pengguna jalan raya yang lain memberi petunjuk tentang kecenderungannya melakukan jenayah (lihat perenggan 14).

(6) Tuntutan sedemikian dalam kes ini tidak patut dibenarkan atas alasan polisi awam (lihat perenggan 14).]

**Notes**

For cases on negligence, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1396–1398.

**Cases referred to**

*Alexandrou v Oxford* [1993] 4 All ER 328, CA (refd)
*Ancell and another v McDermott and others* [1993] 4 All ER 355, CA (folld)
*Donoghue (or McAlister) v Stevenson* [1932] AC 562, HL (folld)
*Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (refd)
*Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2; [1970] AC 1004, HL (not folld)
*Marshall v Osmond and another* [1983] 2 All ER 225, CA (refd)
*Syarizan bin Sudirman (a child claimed through the father and his attorney Sudirman bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530, HC (not folld)
*Yuen Tat-Cheong and another v Urban Council* [1987] HKCU 190, HC (refd)

**Legislation referred to**

Road Traffic Rules 1959 s 9(1)

*R Pusparashi (Senior Federal Counsel, Attorney General's Chambers) for the appellants.*
*Kuthubul Zaman Bukhari (Zaman & Associates) for the respondent.*

**Abdul Rahman Sebli J:**

THE FACTS

**[1]** This is a weird claim. On 17 April 2009 at about 5pm the first appellant

was on patrol duty with another police officer in a mobile patrol vehicle ('the MPV') at Taman Bayu Puteri Johor Bahru when they saw a Proton Waja bearing registration No BGL 5272 ('the Proton Waja') acting suspiciously. They approached the Proton Waja to carry out checks. Suddenly it sped off towards Jalan Permas Jaya. A high speed chase then ensued. The beacon lights and siren of the MPV were activated. When they reached the end of the Permas Jaya bridge, the Proton Waja pulled up suddenly, causing the MPV to knock its rear bumper. The chase then continued towards the Pasir Gudang Highway. The Proton Waja weaved through the heavy traffic in a zig-zag manner before encroaching into the opposite side of the road and against the flow of traffic. In the process it knocked an oncoming Avanza before colliding head-on with the car driven by the respondent. This caused the Proton Waja to stall in the middle of the road. The MPV which was following closely behind could not avoid the Proton Waja in time and knocked its rear for the second time. Altogether five cars were involved in the incident. The Proton Waja driver was later apprehended and the police found a revolver and seven live bullets inside the car, which was confirmed to be stolen.

## THE RESPONDENT'S CLAIM

**[2]** The respondent sustained serious bodily injury as a result of the accident. He filed a claim in the sessions court, not against the driver of the Proton Waja who crashed into his car but against the driver of the MPV who chased after the Proton Waja. He claimed for damages against the appellants for a sum in excess of RM500,000, alleging that his injuries were caused by the negligence of the first appellant as driver of the MPV. At the conclusion of the trial the learned sessions court judge found the appellants 100% liable and awarded the respondent RM288,557.57 in damages with interest at the rate of 5%pa. This is the appellants' appeal against the decision.

## WHETHER DUTY OF CARE OWED

**[3]** The question for determination is whether the circumstances of the case are capable of establishing a duty of care owed to the respondent by the police. The locus classicus on the point is the House of Lords decision in *Donoghue (or McAlister) v Stevenson* [1932] AC 562 where Lord Atkin propounded the following celebrated proposition of law:

> The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly

affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

**[4]** It is undisputed that the loss suffered by the respondent was not caused directly by the act or omission of the first appellant but was caused directly by the act of the Proton Waja driver. Applying the 'neighbour' principle in *Donoghue v Stevenson* clearly the respondent does not fall under the category of persons 'who are so closely and directly affected' by the act of the police in chasing after the Proton Waja. The act that so closely and directly affected the respondent was the act of the Proton Waja driver in encroaching into his path. The 'neighbour' relationship was therefore between the respondent and the Proton Waja driver rather than between the respondent and the first appellant. It does appear that the appellants are being made jointly and vicariously liable for someone else's rash and negligent act. In normal circumstances the proper person to be sued would be the driver who collided with the plaintiff's car and it would be up to driver to add as third parties those whom he felt should indemnify him in the event he is found liable for the accident. But for reasons best known to himself the respondent went straight for the first appellant and his employers instead. The Proton Waja driver was not even named as a party.

**[5]** The rule that a policeman in hot pursuit can be held liable in negligence is entrenched in the proviso to s 9(1) of the Road Traffic Rules 1959 which reads as follows:

> Any ambulance, fire engine or police vehicle shall when on urgent duty have the right of way over all other traffic if it makes known by its approach by means of sounding of a distinctive siren, bell or two-tone horn: Provided that such priority shall not be held to relieve the driver of any such vehicle of his liability under the civil law or the provisions of any law relating to dangerous, careless or inconsiderate driving.

**[6]** Indeed the duty to take care is owed not only to other road users but even to the fleeing suspect himself: see *Marshall v Osmond and another* [1983] 2 All ER 225 where it was held by the Court of Appeal that a policeman in pursuit owes a duty of care to the suspect he is pursuing and the standard of care on such policeman and in such situation is to exercise such care and skill as is reasonable in the circumstances.

## WHETHER SPECIAL RELATIONSHIP SHOWN

**[7]** The whole basis of the learned trial judge's finding on liability is that it was reasonably foreseeable that the first appellant's act of chasing after the Proton Waja would inevitably end up with an accident. In her own words:

Berdasarkan keterangan di atas adalah jelas bahawa seorang yang munasabah pastinya dapat menjangkakan tindakan pihak polis dalam kes ini yang masih mengejar suspek, terutamanya selepas kemalangan di atas jambatan itu, tidak boleh tidak akan menjurus kepada berlakunya kemalangan. Oleh itu kemalangan yang berlaku tidak terlalu 'remote' dan di luar jangkaan. Maka mahkamah memutuskan bahawa defendan 1 adalah cuai dan defendan-defendan adalah 100% bertanggungan atas kejadian kemalangan tersebut.

**[8]** Foreseeability was therefore the only factor the learned trial judge took into account in determining whether a duty of care was owed by the police to the respondent. Neither counsel for either side has cited any local authority for or against the proposition that the police are liable for losses to the plaintiff caused by the act of a third party. The position in England is that where the plaintiff's loss is not caused directly by the defendant's act, foreseeability is not the sole test for determining whether a duty of care is owed. In order to succeed the plaintiff must show that in the particular circumstances of the case he stands in a special relationship to the defendant, from which the duty of care arose. The case on point is *Alexandrou v Oxford* [1993] 4 All ER 328. The facts are these. On a Sunday evening the plaintiff's clothing shop was burgled. The burglars' entry activated the shop's exterior and interior burglar alarms and also a recorded telephone message to the local police station stating that the alarm had been activated. Two police constables promptly attended the scene, but failed to inspect the rear of the shop where the burglars had forced entry. Some hours later a substantial quantity of goods was removed from the shop. The plaintiff sued the chief constable for the value of the goods stolen, by, inter alia, failing to take adequate precautions to discover why the alarm had been activated and in assuming that it was a false alarm. At the conclusion of the trial the learned trial judge found that the theft would have been prevented if the police officers had properly inspected the rear of the premises and that the police had thereby been in breach of a duty of care owed to the plaintiff.

**[9]** On appeal to the Court of Appeal the decision was reversed. Glidewell LJ in answering the question 'Did the police owe the plaintiff a duty of care?' said at p 334:

> The difficulty in answering this question arises from the fact that the plaintiff's loss was not caused directly by any act or failure on the part of the police, but by the activities of the burglars. The police, on the judge's findings of fact, were indirectly responsible for the plaintiff's loss, because of Pc Smith's failure properly to inspect the rear of the shop when he realised at 9.26pm that the alarm bell had stopped ringing, and his consequent failure to prevent or intercept the theft.
>
> It is not sufficient for the plaintiff, who seeks to establish that a defendant owed him a duty to take reasonable care to prevent loss being caused to the plaintiff by the activities of another person, simply to prove that if the defendant did not exercise reasonable care it was foreseeable that the plaintiff would suffer the loss. It is necessary for the plaintiff also to show that in the circumstances of the particular

case he stands in a special relationship to the defendant, from which the duty of care arose: see per Lord Wilberforce in *McLoughlin v O'Brian* [1982] 2 All ER 298 at p 303; [1983] 1 AC 410 at p 420:

> That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear.

**[10]** On the facts it was held that the plaintiff did not stand in a special relationship to the police. No duty of care was therefore owed to the plaintiff. *Ancell and another v McDermott and others* [1993] 4 All ER 355 is another Court of Appeal decision which absolved the police of liability for the act of a third party. In that case the first defendant, while driving his car along a road in Bedfordshire at about 5am ran over a length of aluminium tube which had fallen from the fourth defendant's truck and ruptured the fuel tank of his car, leaving a trail of diesel on the road behind him. A few minutes later officers of the Hertfordshire police in a patrol car noticed the diesel fuel on the road and followed the trail until they came to the first defendant's stationary car beside the road. The officers notified the Bedfordshire police by radio that diesel fuel had been spilt on the road but took no action beyond that. At 5.20am an officer of the Bedfordshire police drove past the scene of the spillage, noticed the presence of the diesel fuel on the road and reported the matter to the Bedfordshire highways department. He then continued on with his police duties. Ten minutes later the first plaintiff's wife skidded on the diesel fuel, lost control of her car and collided head-on with an oncoming lorry. She sustained injuries from which she later died.

**[11]** The first and second plaintiffs who were passengers in the car were injured. The plaintiffs brought an action for damages against the first and fourth defendants and also against the chief constables of the Hertfordshire and Bedfordshire police alleging that they were liable for the breach of duty and negligence on the part of their officers. The chief constables applied to strike out the claims against them but the judge dismissed their application on the ground that whether a duty of care existed on the part of the police officers depended on the precise circumstances, including the nature of the hazard, the extent of the danger created and the likelihood of injury and that those matters could only be determined at the trial of the action.

**[12]** The chief constables appealed. In allowing the appeal the Court of Appeal held that the police were under no duty of care to protect road users from, or to warn them of, hazards discovered by the police while going about their duties on the highway, and there was in the circumstances no special relationship between the plaintiffs and the police giving rise to an exceptional duty to prevent harm from dangers created by another. Applying the principle to the facts of the present case the police were under no duty of care to protect

road users from, or to warn them of, the dangers created by the reckless driving of the Proton Waja driver. There was in the circumstances no special relationship between the respondent and the police giving rise to an exceptional duty to prevent harm to the respondent from the dangerous situation created by the Proton Waja driver. The mere fact that the accident was foreseeable does not of itself give rise to a duty of care towards the respondent.

**[13]** In *Yuen Tat-Cheong and another v Urban Council* [1987] HKCU 190 the High Court of Hong Kong also relied on English cases in determining liability for losses caused by a third party. Sears J in dismissing the plaintiff's claim said:

> I turn finally to the last ingredient of negligence and I couple it whether there is a duty of care owed. I gratefully cite the judgments of certain highly respected judges in England on the liability imposed for the act of a third party. In *Lamb v Camden London Borough Council* [1981] 2 All ER 408 Oliver LJ said at p 419:
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> > There may, for instance, be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it fixes a defendant with responsibility for the act of a third party over whom he has and can have no control.
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> In *Pearl (Exporter) Ltd v Camden London Borough Council* [1984] QB 342, Wailer LJ at p 349 said:
>
> > But no case has been cited to us where a party has been held liable for the acts of a third party when there was no element of control over the third party …
>
> At p 359 Goff LJ in a lucid exposition of the liability in negligence for the wrongdoing of a third party concluded by saying:
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> > I know of no case when it has been held in the absence of a special relationship, that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff.
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> The decision in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 was an example of such a special relationship. A more recent case was *King v Liverpool CC* [1986] 3 All ER 544, when the earlier decisions were reviewed and the difficulties of establishing liability pointed out.

**[14]** Datuk Kuthubul Zaman for the respondent relied heavily on the House of Lords decision in *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2; [1970] AC 1004 to support his contention that the first appellant breached his duty of care towards the respondent when he continued to chase after the Proton Waja driver after it had become apparent to him that the driver was determined to escape by whatever means possible and without regard for the safety of other road users. It was argued that the first appellant ought to have abandoned the

hot pursuit when the Proton Waja encroached into the opposite side of the road and against the flow of traffic, thereby endangering the safety of other road users. What the argument amounts to is this: If a crime suspect, in escaping from the police in a high speed chase acts in a manner that poses grave and immediate danger to other road users, the police must back off. With due respect the argument is incredulous. Not only will the police be in dereliction of duty if they were to take that course of action but will give the criminal a free passage to freedom. That is not what the police are for. In this case the suspect turned out to be armed and dangerous as proven by the discovery of the revolver and seven live bullets inside the Proton Waja. It is possible that he was on his way to commit a crime when he was stopped in his tracks by the police. The manner he made his getaway, with no regard whatsoever for the safety of other road users gives some indication as to his criminal propensity.

**[15]** A distinction has to be drawn between a situation where the police are required to hold fire while pursuing a suspected criminal, for example in a crowded market place or on a busy highway and a situation where the suspect causes harm to a third party in his bid to escape from the police. To impose on the police the duty to protect the third party from danger created by the fleeing suspect in the latter situation is to impose unwarranted burden on the police in their primary duty of suppressing crime. Only when such duty of care is owed can a special relationship be established between the police and the third party. Perhaps a simple example may illustrate the point more clearly. A robber robs a bank and is chased by the police. In making his getaway he knocks down a pedestrian causing him injury. Going by the sessions court's reasoning the police will have to pay for the pedestrian's losses while the robber gets away not only with his loot but also with his liability.

**[16]** The *Dorset Yacht* case relied upon by the respondent involved a situation where some Borstal boys escaped from custody while their guardians were asleep, boarded a yacht moored nearby in order to make their way to the mainland and maneuvered it in such a way as to damage the plaintiff's yacht. The Home Office was held liable as the damage to the yacht was not too remote as it could reasonably be foreseen as a consequence of leaving the boys free to escape at will. The facts in *Dorset Yacht* are poles apart from the facts of the present case. In the first place the police in the present case had no element of control over the Proton Waja driver, unlike the Borstal officers in the *Dorset Yacht* case whose duty it was to ensure that the Borstal boys did not escape from their custody. The officers' instructions were to keep the boys in custody and under their control but in breach of their instructions the officers simply went to bed leaving the trainees to their own devices. All seven boys who escaped had criminal records and five of them had a record of previous escapes from Borstal institutions. Secondly, the Proton Waja's encroachment into the respondent's right of way was not due to the first appellant's fault. It was a deliberate act by

the Proton Waja driver to avoid capture. Thirdly, the police had no duty to ensure that the Proton Waja driver drove carefully in making his getaway. Their duty was to catch him. Lord Keith of Kinkel in commenting on the *Dorset Yacht* case in his judgment in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 said at p 62:

> The *Dorset Yacht* case was concerned with the special characteristics or ingredients beyond reasonable foreseeability of likely harm which may result in civil liability for failure to control another man to prevent his doing harm to a third. The present case falls broadly into the same category. It is plain that vital characteristics which were present in the *Dorset Yacht* case and which led to the imposition of liability are here lacking. Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys"

**[17]** Similarly in the present case vital characteristics which were present in the *Dorset Yacht* case are lacking. No liability could therefore be attached to the police for failing to prevent the Proton Waja driver from encroaching into the respondent's path. The danger created by the Proton Waja driver in the way he maneuvered the car was not special to the respondent but to all other road users. To paraphrase Lord Keith in *Hill v Chief Constable of West Yorkshire*, the respondent was only one of many road users who might be at risk from the Proton Waja driver's reckless act but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys. Counsel's reliance on *Dorset Yacht* is therefore misconceived. So is his reliance on the judgment of VT Singham J in *Syarizan bin Sudirman (a child claimed through the father and his attorney Sudirman bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530. It is clear in that case that no third party was involved. The first plaintiff's injury was directly caused by the pursuing policeman who kicked the first plaintiff's speeding motorcycle in an attempt to force him to stop, causing the first plaintiff to crash and sustain serious injuries. The question before the court was straightforward, namely whether the policeman was in breach of his duty of care towards the first plaintiff when he kicked the motorcycle. Citing *Marshall v Osmond & Anor* the learned judge came to the conclusion that the policeman had not exercised such care and skill as was reasonable in all the circumstances.

## CLAIM AGAINST PUBLIC POLICY

**[18]** Claims of this nature should also be disallowed on ground of public policy. In the *Ancell* case Beldam LJ cautioned that the extreme width and scope of such a duty of care would impose on the police force potential liability

of almost unlimited scope, and that would be against public policy because it would divert extensive police resources and manpower from, and hamper the performance of, ordinary police duties. In *Hill v Chief Constable of West Yorkshire* Lord Keith made the following pertinent observations:

> But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v Merton London Borough Council* [1978] AC 728, 751–752 might fall to be applied was a limited one, one example of that category being *Rondel v Worsley* [1969] 1 AC 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried in a defensively frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be unreasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes.

**[19]** Lord Templeman in his judgment in the same case spoke in similar vein when he said:

> Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.
>
> This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public and the elected representatives of the public must ensure that the public get the police force they deserve.

CONCLUSION

**[20]** The effect of the authorities discussed above is that before the police can

be held liable for any loss or damage caused to the plaintiff by a third party it must be shown that the police have a special relationship to the plaintiff, giving rise to an exceptional duty of care to prevent harm from being inflicted on the plaintiff by the third party. It must be shown: (a) that the police have power of control over the third party's actions and (b) that they have a duty to ensure that the third party does not act in such a way as to endanger the safety of the plaintiff. The onus probandi lies upon the plaintiff to establish these two elements. In the present case it has not been shown that the police had power of control over the actions of the Proton Waja driver. Neither has it been shown that the police had a duty to prevent him from driving recklessly in his bid to escape. There was in the circumstances no special relationship between the police and the respondent giving rise to an exceptional duty of care on the part of the police to prevent the Proton Waja driver from causing harm to the respondent. The sessions court was therefore wrong in finding the appellants liable for the loss suffered by the respondent. For these reasons the appeal was allowed with costs.

*Appeal allowed with costs.*

Reported by Ashok Kumar